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No. 01-1539

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IN THE

Supreme Court of the United States

PETER SUDARSKY,

Petitioner,

—v.—

THE CITY OF NEW YORK, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSIT AUTHORITY, and THE METROPOLITAN TRANSIT AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

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THIS COURT'S INTERVENING DECISION RESTORES DISCRETION AND RELIEVES COURTS BELOW FROM A REQUIREMENT, REAL OR IMAGINED, TO REJECT TAKING CASES ON PROCEDURAL GROUNDS

The direct impact of The Court's finding in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* on the standing of *Sudarsky v. City of New York* is found on page 33, where The Court holds that

> In rejecting petitioners' *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other. . . . The outcome instead 'depends largely "upon the particular circumstances (in that) case' " citing *Penn Central*, [438 U.S.] at 124 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

This finding frees courts below from being forced into arbitrary awards where nuisance and public interest concerns are mitigating factors in regulatory takings claims. Those courts no longer need to feel "under the gun" of "categorical rules" which deny discretion to consider, for example, the balance between harm to an owner v. benefit to the community. *Tahoe-Sierra* may relieve courts below from a requirement, real or imagined, to reject regulatory takings cases on unreal or procedural grounds of ripeness and *res judicata* as occurred in pendant case.

On grounds of "fairness and justice," reiterated in *Tahoe-Sierra*, Plaintiff's Petition should be granted. After 12 years of motion practice, trial of the merits is appropriate in this case.

TAHOE-SIERRA PROVIDES FOR AN INDIVIDUALIZED EXAMINATION OF THE CIRCUMSTANCES OF A TAKING CLAIM ON A CASE BY CASE BASIS

Cities use moratoria all the time to "maintain the status quo pending study and governmental decision making," as This Court noted on p. 12 of its decision, citing Williams v. Central, 907 P. 2d 701,706 (Colo. App. 1995).

The Court makes clear that its evaluation of a regulatory takings claim "entails complex factual assessments of the purposes and economic effects of government actions."

> The answer to the abstract question of whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case.
>
> Our regulatory takings jurisprudence . . . is characterized by "essentially ad hoc, factual inquiries," Penn Central, 438 U.S., at 124, designed to allow "careful examination and weighing of all the relevant circumstances." Palazzolo, 533 U.S., at 636 (O'Connor, J., concurring, p. 18).

This case gives The Court the opportunity to do exactly what its *Tahoe-Sierra* decision holds appropriate—that is to provide for an individualized examination of the circumstances as applied to a particular parcel on a case by case basis. The Court in its *Tahoe-Sierra* decision sets forth some of those particular circumstances which it may choose to examine whenever the government imposes . . . a moratorium on development: i.e.

> "investment backed expectations, the actual impact of the regulation on any individual, the importance

> of the public interest served by the regulation, or the reasons for imposing the temporary restriction." Id. p.16.

The Court also refers to the clear and undisputed relationship between the restrictions imposed by the regulatory agency and the results that the agency sought to achieve.

In pendant case, not one of these factors was litigated or examined by The Court below. For example, The Court Below failed to rule on the failure of The City to "substantially advance a legitimate state interest" noted on pg. 30 of the *Tahoe* decision with reference to *Agins* and *Monterey*. The City's easement demand provided for a tunnel which could not be built even if the easement was obtained.

A tunnel which cannot be built can hardly contribute to a reduction of problems of pedestrian circulation caused by the "general increase in the population" which defendants suggested would result from Plaintiff's planned 149 unit apartment house replacing 50 units in existing brownstones scheduled for demolition.

The Court below held my regulatory takings claim was not ripe for trial on two grounds: 1) I had failed to apply for a variance; 2) I had not obtained a "final determination" of permitted use of the property, and because I sold the property, I can never do so. The Court did not examine the futility of either action. A variance application was not available under provisions of the New York City Zoning resolution, and efforts to obtain a final determination were made futile by the imposition of a prerequisite for dedication of an easement which Defendants had made impossible to dedicate.

Rather than identifying and adjudicating the issues of the case, The Court below followed the practice in the

Circuits of barring a regulatory takings claim from the federal courts on feeble and mistaken grounds of ripeness, holding that Plaintiff had not obtained a "final determination" of the permitted use of his eight contiguous properties in midtown Manhattan. The Court below reached its finding without reference to the futility of Plaintiff's efforts to obtain that determination. The regulation imposed by defendants in this case barred not only issuance of a permit on plaintiff's vacant property but also any efforts Plaintiff made or could have made to regain use of his property and ripen his claim.

On the basis of its finding of lack of ripeness and its additional finding that Plaintiff's claim can never become ripe because he sold the property before obtaining that final determination of permitted use, The Court below then granted Defendants' Rule 12(b)(6) motion to dismiss in its unpublished decision, although no prior court ever permitted trial of the merits in this case or adjudicated the issues of fact which require resolution for any decision on the merits.

SUDARSKY V. CITY OF NEW YORK PRESENTS THE SAME ISSUE WHICH THIS COURT ADDRESSES IN *TAHOE-SIERRA*

Whether a moratorium on development constitutes a regulatory taking of property requiring compensation under the Takings Clause is the question raised by Plaintiff in his suit.

A ban on issuance of a permit necessary to make any use of Plaintiff's vacant property was imposed for the purpose of facilitating Plaintiff's dedication of an easement under the property. Defendants said they required the easement to make possible future construction of a tunnel to connect two subway stations. The permit moratorium continued for 23 months during a process of

negotiation of terms of the easement. The futility of further efforts to dedicate the easement became clear when Defendant City of New York acknowledged that a tunnel had not been designed and refused to provide dimensions of an easement which they would also agree to accept.

IT IS NOT NECESSARY FOR THE COURT TO DECIDE WHETHER PLAINTIFF'S CLAIM FALLS UNDER *LUCAS* OR *PENN CENTRAL*

A trial of the merits will determine whether there was a taking of all use and whether that taking was made permanent by the City's dilatory actions and refusal to grant a permit necessary for the owner to make use of his property or to obtain a "final determination" of its permitted use.

Although the decision of This Court holding that a decision in a regulatory takings claim is fact specific, The Court Below failed to examine the facts. Whether the temporary regulation which barred all use of the property was made permanent by the dilatory, deliberate actions of the municipality is a question of fact. A court or a jury can decide the question. It cannot be answered without a trial.

WHETHER A PERMANENT OR TEMPORARY REGULATORY TAKING CLAIM REQUIRES COMPENSATION IS A SUBJECT FOR TRIAL

The *Tahoe-Sierra* decision of The Court notes that, "Logically a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted (p.28, Cf. Agins v. City of Tiburon, 447, U.S., at 263, n.9).

> A permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole,"

> whereas a temporary restriction that merely causes a diminution in value is not.

But even this observation of The Court is fact sensitive and falls under the Court's requirement for evaluation of the "particular circumstances" of the case.

In *Sudarsky*, Defendants "certified" a need for an easement which The City could not use if it was obtained for the purpose of delaying Plaintiff's use of the property in an effort to preserve brownstones at the sole expense of their owner. Two years after their first interference with Plaintiff's ability to obtain a permit and commence construction, Defendants refused to provide dimensions of an easement they would agree to accept. Dedication of the easement was a barrier to a permit. No sign existed that Defendants would ever lift their easement barrier while Plaintiff owned the property. Whether the taking was temporal or permanent may be a question for a court or jury to decide, but the existence of the question does not justify a Court's grant of a res judicata motion dismissing the claim.

The opinion of This Court in *Tahoe-Sierra* holds that

> The ultimate constitutional question is whether the concepts of "fairness and justice" that underlie the Takings Clause will be better served by . . . categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases.

Whichever rule applies, the Court upholds Justice O'Connor in her concurring opinion in Palazzolo:

> The better approach to claims that a regulation has effected a temporary taking "requires careful examination and weighing of all the relevant circumstances."

The requirement for fairness and justice in a Fifth Amendment Takings Clause case is not served by dismissal on grounds that a plaintiff failed to take a futile or unavailable action.

Plaintiff's claim for costs which accrued during the period of time defendants barred plaintiff from any use he could make of his property stands uncontested. Yet that claim was not reached by The Court below. The Court simply overlooked it, deciding, apparently, that a claim for costs exceeding $3,000,000 while all use of property was barred is too insignificant for a Federal Court to trouble itself with as long as a ripeness barrier may exist to plaintiff's claim for a permanent regulatory taking and the temporary claim is temporal.

The Decision in Tahoe-Sierra rejects a "set formula" for determining when "justice and fairness" require compensation, but it does not suggest that a court should walk away from a decision based on a finding of ripeness when the very actions needed to achieve ripeness were barred by the actions of a municipality.

Defendants proudly acclaimed that they preserved the "light and air above the property for the health and welfare of future generations of New Yorkers." The problem is that they did so at the sole expense of Plaintiff-Appellant Peter Sudarsky.

Defendants managed a windfall. Plaintiff lost the earnings of an adult lifetime.

THIS PETITION DEALS WITH THE NATURE AND EXTENT OF A RIPENESS BAR TO LITIGATION OF REGULATORY TAKING CASES

Now that This Court's *Tahoe-Sierra* decision provides some flexibility to courts below in the adjudication of temporary takings claims, perhaps This Court should relax ripeness requirements, some of which may take years to achieve while an owner is required to meet costs of ownership which can make viable economic use of a property unlikely. A variance application, for example, may take years to resolve in most jurisdictions. In This Case, a variance application was prohibited by the applicable zoning laws.

Specifically, This Case raises the issue of whether a ripeness bar should extend to cases where an owner has had to sell before adjudication of a takings claim or before obtaining a "final determination" of permitted use of property. This Court's requirement for "Fairness and Justice" suggests that an owner not be barred from pursuing a takings claim when delay and dilatory tactics of a municipality have made futile efforts to obtain that "final determination" held by The Court below as necessary to cross the ripeness barrier.

CONCLUSION

The Petition should be granted, the judgment of The Court below vacated, and the case remanded for further procedings in the light of *Tahoe-Sierra v. Tahoe Regional Planning Association.*

Respectfully submitted

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